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The corroboration requirement in Scottish criminal trials: should it be retained for some forms of problematic evidence?

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Abstract The merits of corroborated evidence in criminal trials have been hotly debated in many jurisdictions, with most having now abandoned this requirement. The Scottish government intends to do likewise—at a time when some other jurisdictions are considering its reintroduction. This article considers whether there is merit in retaining a corroboration requirement for two types of evidence, namely for visual identifications and extra-judicial confessions. It explores whether the introduction of a weighted jury majority, as the government proposes, can compensate for the problematic nature of such evidence. In respect of visual identification evidence, it is argued that any safeguard which corroboration might have provided has been weakened by the way in which the courts have developed the law. Alternative mechanisms for improving the quality of such evidence are assessed. In relation to confessions,

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the article argues that increasing the jury majority is a poor substitute for corroboration.

Keywords Evidence law; Corroboration; Scotland; Identification; Confession

The background

The case of *Cadder v HM Advocate*¹ was a landmark decision by the UK Supreme Court which established that suspects in Scotland who are detained by the police for questioning have a right to a consultation with a lawyer before and during such questioning.² For the prosecution to attempt to lead evidence of the answers given by a suspect who had not been advised of this right was a breach of the suspect's right to a fair trial, rendering such answers inadmissible. As a result of the *Cadder* case the right to legal advice was enshrined in legislation.³ Having availed themselves of their right to legal advice, many suspects now respond to police questioning with a stock reply, declining to answer 'on the advice of their solicitor'. This development is unsurprising; a similar pattern of behaviour was to be seen when the right was introduced into English law 25 years ago.⁴ However, English and Scottish criminal procedure differ in two crucial respects which are pertinent to the issue of silence at the police station. First, unlike in England,⁵ no adverse inferences may be drawn at trial in Scotland as a result of a suspect's refusal to respond to questions from the police. Secondly, at present Scottish law retains a corroboration rule. This requires the 'facts in issue' to be proved by two independent sources of evidence. Thus the prosecution must establish: (1) that the crime was committed, and (2) that the accused was the person who committed it, and must (generally) provide two independent sources of evidence for each of these.⁶ In many cases one of the two sources of evidence

1 2011 SC (UKSC) 13.

2 For a critique of the case see P. R. Ferguson, 'Repercussions of the *Cadder* Case: the ECHR's Fair Trial Provisions and Scottish Criminal Procedure' [2011] Crim LR 743; J. McCluskey, 'Supreme Error' (2011) *Edinburgh Law Review* 276. More supportive commentary includes F. Leverick, 'The Supreme Court Strikes Back' (2011) *Edinburgh Law Review* 287; F. Stark, 'The Consequences of *Cadder*' (2011) *Edinburgh Law Review* 293.

3 Criminal Procedure (Scotland) Act 1995, s. 15A, inserted by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010, s. 1.

4 By the Police and Criminal Evidence Act 1984, s. 58. For an assessment of the English law position, see P. Pleasence, V. Kemp and N. J. Balmer, 'The Justice Lottery? Police Station Advice 25 Years on from PACE' [2011] Crim LR 3.

5 Criminal Justice and Public Order Act 1994, s. 34. See D. Birch, 'Suffering in Silence' [1999] Crim LR 769.

6 There are several statutory exceptions to this, generally relating to minor offences, e.g. Dog Fouling (Scotland) Act 2003, s. 1(4). Where offences are aggravated by various forms of prejudice, there need not be corroboration of the accused's prejudice. See, e.g., Offences (Aggravation by Prejudice) (Scotland) Act 2009, s. 1(4): 'Evidence from a single source is sufficient to prove that an offence is aggravated by prejudice relating to disability'.

would be a confession, or at least a partial admission, from the suspect. Thus the recognition of the right to legal advice following *Cadder* largely removed one common source of evidence and resulted in thousands of cases having to be abandoned by the prosecution due to lack of corroboration.⁷

In October 2010 the Scottish government appointed Lord Carloway to undertake a review of aspects of Scottish criminal procedure and in particular ‘the requirement for corroboration and the suspect’s right to silence’. He published his Final Report in November 2011⁸ and the Scottish government then issued a Consultation Paper.⁹ As had been widely predicted, both documents included the recommendation that the corroboration rule be abolished.¹⁰ The rule has been described as ‘one of the most notable and precious features of Scots criminal law’.¹¹ It is unsurprising therefore that major voices within the legal profession in Scotland have been raised against the proposed abolition,¹² or have urged further reflection before such a step is taken,¹³ albeit that abolition also has its supporters.¹⁴ Despite the widespread opposition, the Scottish government decided that the case for abolition was established, and instead entered into a further consultation in *Reforming Scots Criminal Law and Practice: Additional Safeguards Following the Removal of the Requirement for Corroboration* (2012). This invited

7 See R. M. White and P. R. Ferguson, ‘Sins of the Father? The “Sons of *Cadder*”’ [2012] Crim LR 357 at 358.

8 *The Carloway Review: Report and Recommendations* (2011), available at <<http://www.scotland.gov.uk/Resource/Doc/925/0122808.pdf>>, accessed 30 October 2013.

9 Scottish Government, *Reforming Scots Criminal Law and Practice: The Carloway Report*, Scottish Government Consultation Paper (2012), available at <<http://www.scotland.gov.uk/Resource/0039/00396483.pdf>>, accessed 30 October 2013. For commentary and critique see J. Chalmers and F. Leverick, ‘“Substantial and Radical Change”: A New Dawn for Scottish Criminal Procedure?’ (2012) 75 MLR 837; P. R. Ferguson and F. E. Raitt, ‘A Clear and Coherent Package of Reforms? The Scottish Government Consultation Paper on the Carloway Report’ [2012] Crim LR 909; and F. E. Raitt, ‘The Carloway Review: An Opportunity Lost’ (2011) 15 *Edinburgh Law Review* 427.

10 *Carloway Review*, above n. 8, para. 7.2.55; Scottish Government, above n. 9 at para. 9.23.

11 G. H. Gordon, ‘At the Mouths of Two Witnesses: Some Comments on Corroboration’ in R. F. Hunter (ed.), *Justice and Crime—Essays in Honour of the Rt Hon the Lord Emslie* (T & T Clark: Edinburgh, 1993) 33.

12 Senators of the College of Justice, *Responses to the Carloway Review* (2012) 22–6; D. J. C. Thomson, ‘A Defence of Corroboration in Criminal Law’ (2012) *Scots Law Times* 7; G. Lindhorst and S. Merk, ‘Corroboration Revisited’ (2013) *Scots Law Times* 147.

13 Scottish Parliament, Justice Committee Official Record, 13 December 2011, 624.

14 Representatives of Scottish Women’s Aid and Victim Support supported abolition—see Scottish Parliament, Justice Committee Official Record, 20 December 2011, 777–8. See also F. Crowe, ‘A Case for the Abolition of Corroboration in Criminal Cases?’ (2011) *Scots Law Times* 179; P. Duff, ‘The Requirement of Corroboration in Scottish Criminal Cases: One Argument Against Retention’ [2012] Crim LR 513; F. E. Raitt, ‘Carloway: A View from the Academy’ (2012) *SCOLAG* 9. For an assessment of the likely impact of abolition on sexual offences, see I. C. M. Cairns, ‘Does the Abolition of Corroboration in Scotland Hold Promise for Victims of Gender-based Crimes? Some Feminist Insights’ [2013] Crim LR 560.

comment on what additional modifications to Scottish criminal procedure might be required once corroboration was indeed abolished.¹⁵ Prior to the conclusion of that consultation exercise, it brought before the Scottish Parliament the Criminal Justice (Scotland) Bill, s. 57(2)¹⁶ of which provides that:

If satisfied that a fact has been established by evidence in the proceedings, the judge or (as the case may be) the jury is entitled to find the fact proved by the evidence although the evidence is not corroborated.¹⁷

Obligatory corroboration warnings have long been abolished in England,¹⁸ but trial judges retain discretion to caution juries of the dangers of convicting on the basis of certain forms of uncorroborated testimony.¹⁹ Similar warnings may be given in Canada, Australia and Ireland.²⁰ Mandatory warnings are controversial, as they may perpetuate beliefs in the inherent unreliability of certain types of witnesses, such as women and children.²¹ There is no requirement in the Scottish Bill for either mandatory or discretionary warnings, which is hardly surprising, since Lord Carloway had recommended that no such warning be provided. However, the Bill does not actually prohibit judges from issuing such warnings where they feel it would be appropriate to do so. Thus it might be expected that the Scottish judiciary would assert a discretion to issue such warnings, as in England.

15 *Additional Safeguards Following the Removal of the Requirement for Corroboration* (2013), available at <<http://www.scotland.gov.uk/Resource/0041/00410935.pdf>>, accessed 30 October 2013.

16 Note that while English Bills have 'clauses', Scottish Bills have 'sections'.

17 This is subject to s. 58, which provides that s. 57 'does not affect the operation of any enactment which provides in relation to the proceedings for an offence that a fact can be proved only by corroborated evidence'. The Explanatory Notes (para. 139) give the example of s. 89(2) of the Road Traffic Regulation Act 1984, which provides that a person cannot be convicted of speeding on the uncorroborated evidence of one witness that he was breaking the speed limit.

18 Corroboration warnings were abolished in respect of children's evidence by the Criminal Justice Act 1988, s. 34; and in respect of accomplices, and complainants in alleged sexual offences, by the Criminal Justice and Public Order Act 1994, s. 32. Corroboration remains a requirement in English law for offences such as perjury: see the Perjury Act 1911, s. 13.

19 Guidance on when warnings ought to be given was provided in *R v Makanjuola* [1995] 1 WLR 1348. For a history of the corroboration warnings in English law, and a critique, see D. J. Birch, 'Corroboration: Goodbye to All That?' [1995] Crim LR 524. See also P. Mirfield, 'Corroboration After the 1994 Act' [1995] Crim LR 448.

20 P. Lewis, 'A Comparative Examination of Corroboration and Caution Warnings in Prosecutions of Sexual Offences' [2006] Crim LR 889; S. Leahy, 'The Corroboration Warning in Sexual Offence Trials: Final Vestige of the Historic Suspicion of Sexual Offence Complainants or a Necessary Protection for Defendants?' (2014) 18 E&P 41.

21 C. Backhouse, 'Skewering the Credibility of Women: A Reappraisal of Corroboration in Australian Legal History' (2000) 29 *University of Western Australia Law Review* 79.

Weighted jury majorities

The Bill introduces a potential safeguard against miscarriages of justice, following the abolition of corroboration, by requiring that a two-thirds majority of a jury must be in favour of a guilty verdict.²² This recognises that the criminal justice system is an integrated structure, so that while Scotland might have been unique in retaining a general corroboration requirement, it was equally unique among adversarial systems in allowing an accused to be convicted on a bare majority—at present, only 8 out of 15 jurors require to favour conviction for a verdict of ‘guilty’ to be returned. Section 70 therefore provides:²³

A jury of 15 members may return a verdict of guilty only if at least 10 of them are in favour of that verdict ... Where ... a jury has fewer than 15 members, it may return a verdict of guilty only if—(a) in the case of 14 members, at least 10 of them are in favour of that verdict, (b) in the case of 13 members, at least 9 of them are in favour of that verdict, (c) in the case of 12 members, at least 8 of them are in favour of that verdict.

It has been suggested that enactment of this section would ‘ensure that the weakest cases, where the level of dissent amongst jurors means that the accused’s guilt cannot fairly be said to have been proven beyond a reasonable doubt, would not proceed to conviction’.²⁴ While this may be true, the whole issue of ‘simple’ versus ‘weighted’ jury majorities has no application to the great majority of trials, since they are conducted under summary procedure, where there is no jury. It seems to have been assumed that corroboration is not a vital safeguard, and no adjustments need be made to compensate for its demise, where the fact-finder in a trial is a professional judge.²⁵ Our focus, however, is on jury trials, where the dangers posed by problematic forms of evidence are more acute.

22 See Policy Memorandum for the Bill, paras 172–175.

23 This would insert a new section (s. 90ZA) into the Criminal Procedure (Scotland) Act 1995.

24 J. Chalmers and F. Leverick, ‘Majority Jury Verdicts’ (2013) *Edinburgh Law Review* 90, 95.

25 For a robust refutation of this argument see D. J. Cusine, ‘To Corroborate or Not To Corroborate’ (2013) *Scots Law Times* 79, where the author states: ‘Most of my previous experience of dealing with criminal cases was as a sheriff; most of these cases were summary cases and I am not in any doubt about the need to retain corroboration and the likelihood of miscarriages of justice were it to be removed’ (*ibid.*).

Problematic forms of evidence²⁶

Since it is likely that corroboration will be abolished, there seems little point in continuing to argue in favour of its retention as a generally applicable requirement.²⁷ Instead, this article considers whether there is merit in providing for limited exceptions: ought a corroboration requirement to be retained for two types of evidence, namely for confessions and visual identification evidence? In exploring the problematic nature of these forms of evidence, it is important to bear in mind the various mechanisms by which the Scottish courts have diluted the corroboration rule. As Peter Duff has so memorably put it, they have employed numerous ‘refinements, exceptions, loopholes and pure “fiddles”’, in order to carve out exceptions, or weaken the application of corroboration.²⁸ Duff makes a strong and eloquent case that as it currently operates in Scottish trials, corroboration offers far less of a safeguard for accused persons than many non-lawyers might suppose. We entirely agree with this view. In considering, then, whether one or both of these two types of evidence ought to form an exception to s. 57, we must also consider whether it is enough to retain the requirement as it currently operates—or whether a strengthening of corroboration is also required.

(a) Eyewitness identification evidence²⁹

Identification may not be an issue at trial, for example, where an accused is pleading self-defence to an assault or homicide charge, or consent in a rape trial, but where it is at issue, a distinction may be made between cases in which the accused is well known to the victim, and the circumstances are such that there was ample opportunity for the witness to see the perpetrator, and those cases in which identification rests on less solid foundations. In the former case, the veracity of the witness may still be in doubt—a witness who states categorically that her husband punched her; that she saw her neighbour trampling her prize roses; or that her boss forced her to have sexual intercourse may be lying, but if she

26 For a detailed description of the Scottish law of evidence, see F. P. Davidson, *Evidence* (SULI: Edinburgh, 2007).

27 The arguments for and against abolition have been skilfully examined in D. Nicolson and J. Blackie, ‘Corroboration in Scots Law: “Archaic Rule” or “Invaluable Safeguard”?’ (2013) 17 *Edinburgh Law Review* 152. For other contributions to the debate, see above nn. 12–14.

28 Duff, above n. 14.

29 Identification of the accused as the perpetrator may of course arise as a result of inferences drawn from circumstantial evidence, such as DNA evidence and fingerprint evidence. Equally, it has been established since *McGiveran v Auld* (1894) 21 R (J) 69 that an accused can be identified as the perpetrator by a witness testifying that he recognised the accused’s voice. In England it has been accepted that such evidence is even more problematic than eyewitness evidence, so that a jury requires to be given a particularly emphatic warning about the dangers of relying on such evidence—*R v Roberts* [2000] Crim LR 183. See also D. Ormerod, ‘Sounds Familiar? Voice Identification Evidence’ [2001] Crim LR 595.

is telling the truth then it is unlikely that her identification of the perpetrator is mistaken. In contrast to this, where a witness and perpetrator were not acquainted before the incident, then it is far more likely that even an honest complainer may be mistaken. In such cases, miscarriages of justice can and do occur. Likewise, where the witness caught but a 'fleeting glance' of the perpetrator, misidentification may occur, even when the accused is someone to whom the witness is well known. The Scottish courts have recognised the problematic nature of such evidence; indeed it has been stated that where a prosecution depends on eyewitness identification, 'the risk of a miscarriage of justice is notorious'.³⁰ This echoes the view of the Criminal Law Revision Committee in England, who regarded 'mistaken identification as by far the greatest cause of actual or possible wrong convictions'.³¹ It might be added that, at least historically, the methods of identification adopted by the police often exacerbated the problem by leading witnesses towards identifying a particular suspect and rejecting any other identification.³²

It has been suggested that wrongful convictions may result from two types of eyewitness identification errors. The first of these has been referred to as a 'primary identification error':

Radically different models have been proposed to explain phenomena of memory and forgetting, but all theories acknowledge that

30 *Gage v HM Advocate* [2011] HCJAC 40 at [29], per LJ-C Gill.

31 Criminal Law Review Commission, *Evidence (General)*, 11th Report, Cmnd 4991 (1972), para. 196. See to similar effect the *Report of the Departmental Committee on Evidence of Identification in Criminal Cases* (1976) para. 8.1. Research from the United States similarly suggests that mistaken identifications account for more miscarriages of justice than all other causes combined: G. L. Wells, 'Eyewitness Identification: Systemic Reforms' (2006) *Wisconsin Law Review* 615 at 615.

32 See *Alexander v R* (1981) 145 CLR 395. See also J. Doris (ed.), *The Suggestibility of Children's Recollections: Implications for Eyewitness Testimony* (American Psychological Association: 1990); I. McKenzie and P. Dunk, 'Identification Parades: Psychological and Practical Realities' in A. Heaton-Armstrong, E. Shepherd and D. Wolchover (eds.), *Analysing Witness Testimony* (Blackstone Press: Oxford, 1999); G. L. Wells and D. S. Quinlivan, 'Suggestive Eyewitness Identification Procedures' (2009) 33 *Law and Human Behavior* 1. Thus, e.g., if a witness has identified someone from police photographs as a possible perpetrator, and then identifies the same individual at an identification parade, it is very likely that the witness's recollection of the perpetrator is based on the photograph as much as the memory of the criminal event. Yet the witness will feel reinforced in the certainty of the identification by the fact that the same individual has been picked out twice—see B. L. Cutler and S. D. Penrod, *Mistaken Identification: The Eyewitness, Psychology and the Law* (Cambridge University Press: Cambridge, 1995) 110; G. L. Wells, M. Small, S. D. Penrod et al., 'Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads' (1998) 23 *Law and Human Behavior* 603.

observers frequently make inaccurate identifications of things and persons.³³

A key problem is that even when observers have an absolutely perfect view of an event or person they interpret rather than straightforwardly record what they are seeing,³⁴ while their memory of what they have seen is unconsciously adapted over time.³⁵ Thus, there may, for example, be a tendency to persuade oneself that a person one sees is actually someone whom one knows, while in one's memory of that event the individual perceived becomes more and more like that person.³⁶ Moreover, while it is commonly supposed that an individual is more likely to recall an event vividly and accurately if it is especially traumatic, the reverse is actually true.³⁷ It is also the case that the prejudices of the witness may significantly distort perception,³⁸ and, even when not prejudiced, observers are much less accurate when identifying members of racial groups different to their own.³⁹ A second error may occur when the fact-finder, particularly if this is a jury, assesses the identification evidence and affords it more weight than it merits,⁴⁰ since juries tend to place great weight on identification evidence.⁴¹ Their faith in such evidence may often be misplaced, but it is usually difficult to assess whether the confidence of a witness in making a positive identification is

33 M. H. Hoffheimer, 'Requiring Jury Instructions on Eyewitness Identification Evidence at Federal Criminal Trials' (1989) 80 *Journal of Criminal Law and Criminology* 585 at 587. See generally Cutler and Penrod, above n. 32; D. M. Thomson, 'The Realities of Eyewitness Identification' (1982) 14 *Australian Journal of Forensic Sciences* 150.

34 G. M. Davies, 'Mistaken Identification: Where Law Meets Psychology Head On' (1996) *Howard Journal of Criminal Justice* 232.

35 K. L. Scheppele, 'The Ground Zero Theory of Evidence' (1998) 49 *Hastings Law Journal* 321.

36 E. F. Loftus, *Eyewitness Testimony* (Harvard University Press: Cambridge MA, 1979) 40. It can be appreciated that this is doubly unfortunate for the individual identified, since a jury is likely to be more impressed by the identification if he was not a stranger to the witness. Of course, it would be a different matter if 'the witness's identification evidence is that the accused was his workmate whom he has known for 20 years and that he was conversing with him for half an hour face to face in the same room', per the Privy Council in *Beckford v R* (1993) 97 Cr App R 409 at 415.

37 See generally Cutler and Penrod, above n. 32 at 103–4.

38 Loftus, above n. 36 at 39; J. W. Shepherd, J. B. Derogowski and H. D. Ellis, 'A Cross-Cultural Study of Recognition Memory for Faces' (1974) 9 *International Journal of Psychology* 205; R. Lindsay and G. Wells, 'What Do We Really Know About Cross Race Eyewitness Identification?' in S. M. Lloyd-Bostock and B. R. Clifford (eds.), *Evaluating Witness Evidence* (Wiley: Chichester, 1983).

39 See generally Cutler and Penrod, above n. 32 at 104.

40 Hoffheimer, above n. 33 at 588.

41 B. L. Cutler *et al.*, 'Juror Sensitivity to Eyewitness Identification Evidence' (1990) 14 *Law and Human Behavior* 185; K. A. Deffenbacher and E. F. Loftus, 'Do Jurors Share a Common Understanding Concerning Eyewitness Behavior?' (1982) 6 *Law and Human Behavior* 15.

well founded,⁴² and since such witnesses tend to be absolutely certain of the truth of what they are saying, cross-examination is rarely an effective means of testing the value of such evidence.⁴³

The problems of identification evidence may be compounded in Scotland, as in contrast to certain other adversarial jurisdictions,⁴⁴ Scots law still allows for dock identification of the accused as the perpetrator of a crime.⁴⁵ Sometimes the purpose of this is simply to confirm that the person in the dock is indeed the person whom the witness has previously identified as having committed the crime.⁴⁶ However, sometimes dock identification takes a different form, where a witness 'has not previously been asked to make an identification at an identification parade and ... does not claim previous acquaintance with the person identified'.⁴⁷ The Scottish High Court of Justiciary has recognised that such dock identification is

open to the criticism [that] ... the accused ... can always be said to have helped the eye-witness to believe he was the same person whom the eye-witness originally observed in incriminating circumstances. Not only does a dock identification lack the safeguards that are offered by an identification parade but it positively increases the risk of wrong identification by suggesting to the witness that the

42 J. C. Brigham and R. K. Bothwell, 'The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications' (1983) 7 *Law and Human Behavior* 19; G. Wells and R. Lindsay, 'How Do People Infer the Accuracy of Memory Testimony?' in S. M. Lloyd-Bostock and B. R. Clifford (eds.), *Evaluating Witness Evidence* (Wiley: Chichester, 1983); and G. Wells and L. Murray, 'Eyewitness Confidence' in G. Wells and E. F. Loftus, *Eyewitness Testimony* (Cambridge University Press: Cambridge, 1984).

43 As Belzil J put it in *R v Atfield* (1983) 25 Alberta LR (2d) 97 at [3], 'the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, absolutely sure of their identification and getting surer with time, but nonetheless mistaken. Because they are honest and convinced, they are convincing'.

44 For example, England—see *R v Hunter* [1969] Crim LR 262, CA. Nevertheless, it seems to be permitted because of practical considerations in magistrates' courts, and in this context it has been held not to be incompatible with Art. 6 of the European Convention on Human Rights (ECHR)—see *Karia v DPP* (2002) 166 JP 753.

45 Cases which have challenged this as being in breach of Art. 6 of the ECHR have been unsuccessful to date. See *Holland v HM Advocate* [2005] UKPC D 1; *Scott v HM Advocate* [2007] HCJAC 68; *McNally v HM Advocate* [2012] HJAC 156; and *C v HM Advocate* [2012] HCJAC 139.

46 So in *Bruce v HM Advocate* 1936 JC 93 a number of witnesses indicated that they had seen 'the accused, James Bruce' committing the offence, but none actually pointed him out in court. It was held that he had not been properly identified, Lord Wark remarking that 'identification of an accused is not a matter which ought to be left to implication' (*ibid.* at 95).

47 *C v HM Advocate* [2012] HCJAC 139 at [12].

person in the dock is the person who is said to have committed the crime.⁴⁸

In *Brodie v HM Advocate*⁴⁹ Lord Justice-General Gill indicated that a trial judge should normally instruct the jury on the particular dangers of dock identification. These might include the fact that the witness is identifying someone they saw only once, perhaps some considerable time previously, that dock identification lacks the safeguards inherent in an identification parade, and that the accused is indeed sitting in the dock. However, the failure to give such a direction did not lead to the conviction being overturned in that case, as it was considered that it had made no real difference to the verdict.

Some years ago the Departmental Committee on Criminal Procedure in Scotland in its Second Report suggested that identification parades should replace dock identification, and that dock identification should not be competent where the witness had failed to identify the accused at a parade.⁵⁰ However, this was never acted upon. Thus in *Dudley v HM Advocate*⁵¹ the court rejected the argument that where there had been no identification parade, it was unfair to allow the complainer to identify the person in the dock as the perpetrator, since there was effectively only one person who could be identified, the court having been cleared.

Very occasionally, questions surrounding dock identification will be an element in a finding that an accused's right to a fair trial under Article 6 of the ECHR has been breached. Such was the finding of the Privy Council in *Holland v HM Advocate*⁵² where the witness identified the accused in the dock, having previously identified two stand-ins but not the accused at an identification parade, and having been informed by a police officer thereafter that she had 'not done very well'. This latter fact was not disclosed to the defence, nor was the fact that criminal charges were

48 Ibid. For a commentary on the case, see C. M. Shead, 'Dock Identification: The Case of *C v HM Advocate*' 2012 SCL 937.

49 [2012] HCJAC 147.

50 Scottish Home and Health Department and Crown Office, *Criminal Procedure in Scotland (Second Report)* Cmnd 6218 (1975) paras 46.10 and 46.13, available at <<http://www.scotland.gov.uk/Resource/Doc/925/0110006.pdf>>, accessed 30 October 2013.

51 1995 SCCR 52.

52 [2005] UKPC D 1. Lord Rodger described an argument that dock identification automatically infringed Art. 6, since it breached an accused's privilege against self-incrimination by compelling him to assist the prosecution, as 'devoid of merit' (at [36]). However, it might be different if 'when in the dock, the accused could be required to assist prosecution witnesses by, say, standing up, or turning round, or showing part of his body. But nothing like that is permitted'. Lord Justice-General Hope in *Beattie v Scott* 1991 SLT 110 at 113 had earlier opined that an accused could not be asked to do anything in the witness box to assist identification.

outstanding against the main Crown witnesses. Lord Rodger opined that both these failures to disclose were:

properly to be seen not as separate and isolated infringements of Article 6(1), but as infringements that each had a bearing on [the] dock identification of the appellant, which was one of the central elements of the prosecution case ... [T]he dock identifications carried with them significant risks of mistake over and above the risk of mistake which go with any eyewitness identification evidence.⁵³

However, this case is exceptional, Lord Rodger pointing out that ‘there is no basis, either in domestic law or in the Convention, for regarding [dock identification] evidence as inadmissible *per se*’.⁵⁴ Thus various subsequent decisions have upheld the fairness of this form of identification, the High Court noting in *Wilson v Service*:⁵⁵ ‘As the Privy Council confirmed in the case of *Holland*, dock identification remains a perfectly legitimate procedure even where, at some stage in the past, a witness has failed to pick out the accused at a formal identification parade’.⁵⁶ Moreover, the High Court in *C v HM Advocate*⁵⁷ quoted Lord Rodger in *Holland*: ‘While one cannot exclude the possibility that, in an extreme case, the judge could conclude that admitting dock identification evidence would inevitably render the trial unfair, normally the requirements of Article 6 will not raise any issue of admissibility’.⁵⁸ The court therefore focused on whether the appeal in front of it was ‘an extreme case’, and concluded it was not.⁵⁹

Given the risk of miscarriages of justice, trial judges in Scotland should direct juries on the problematic nature of identification evidence. However, in *McAvoy v*

53 [2005] 1 SC (PC) 3 at [84].

54 *Ibid.* at [57].

55 [2011] HCJAC 91.

56 [2011] HCJAC 91 at [5]. Admittedly, this was not a case where dock identification was the first formal identification. The complainers had attended the police station to witness a formal identification parade, but this had been cancelled when they had encountered the accused at the station and immediately identified him to the police. See also *McNally v HM Advocate* [2012] HCJAC 156: the fact that the witnesses had failed to pick out the accused in a video identification parade by electronic recording did not make the dock identifications unfair, since they were reinforced by the fact that one of the witnesses had recognised the accused in the street some months after the incident.

57 [2012] HCJAC 139 at [12].

58 [2005] UKPC 1 at [41].

59 [2012] HCJAC 139 at [14]. Emphasis placed on the fact that while there were several dock identifications, the complainer had also ‘picked out the appellant from a photographic emulator sheet and therefore any identification that she makes in court will be subject to the sort of safeguard which is provided by an identification parade’.

*HM Advocate*⁶⁰ while Lord Justice-Clerk Ross noted that ‘the trial judge may feel it desirable to remind the jury that errors can arise in identification’, he continued, ‘precisely what the trial judge says in this connection is a matter for his discretion’.⁶¹ Such discretion was also emphasised in *Blair v HM Advocate*⁶² where the court rejected the contention that the trial judge had erred in failing to charge the jury that identification was an issue to which they required to direct their minds with particular care, Lord Justice-General Hope indicating that ‘no fixed formula requires to be followed’⁶³ in dealing with identification evidence. What then might be said about such evidence? The ‘careful’ directions to the jury in *McLean v HM Advocate*⁶⁴ were upheld by the appeal court. The trial judge had drawn attention to the fact that ‘mistakes about identification have been made in court cases in the past and these have to be guarded against’, but added that ‘it does not follow ... that mistakes have been made here. You will have to judge the soundness of the identifications in this case. You will need to take special care in assessing the quality of this evidence’.⁶⁵ He advised the jury:

to regard the identification evidence as acceptable, you do not need to conclude that the witnesses have made 100% cast iron certain identifications. But you would need to be satisfied that you can rely on the substance of what each witness said. Please remember this: evidence of identification is a matter for great care. No evidence is more convincing and none perhaps is easier to get genuinely wrong.⁶⁶

60 1991 SCCR 123.

61 *Ibid.* at 131.

62 1994 SLT 256.

63 *Ibid.* at 259. This was a case where the judge had spoken about identification at the outset of his charge. Where the trial judge says nothing at all about identification where it is clearly an issue then that probably amounts to a misdirection. Such was the case in *Webb v HM Advocate* 1994 SLT 170 where, despite the fact that the witnesses were very drunk and were claiming to have identified the accused from a distance of 60 yards in the early hours of a February morning, the judge made no mention of the dangers of identification evidence.

64 [2011] HCJAC 99.

65 *Ibid.* at [4].

66 *Ibid.* In England where a case rests on disputed identification evidence, the trial judge has to warn the jury of the need for caution before convicting on the basis of such evidence, explaining how it can be inaccurate, and making reference to its strengths and weaknesses in the case in question: *R v Turnbull* [1977] QB 224. Similar views have been expressed on other Commonwealth jurisdiction: *Mezzo v R* [1986] 1 SCR 802; *Auckland City Council v Bradley* [1988] 1 NZLR 103; *Domican v R* (1992) 173 CLR 555. See also Kingsmill Moore J in *People v Casey* [1963] IR 33 at 39.

While it might be difficult for a judge to say much more, it is suggested that this nevertheless underestimates the unreliability of identification evidence, and in particular does not explain *how* and *why* it might be unreliable.

Moreover, the jury will not have the benefit of expert evidence on the point. In *Gage v HM Advocate*⁶⁷ a car which had been set on fire was found near the locus of the crime. An eyewitness gave a description of the perpetrator's clothing which did not match that found in the car, but she later identified the latter clothing as that worn by the perpetrator when the police showed her a mannequin wearing the items. Another witness identified a car he had seen at the locus as a different make to the one recovered by police, but, when shown the vehicle at the police station, agreed it was similar. At trial, the first eyewitness made a dock identification of the accused on the basis of his eyes, the perpetrator's face having been partially obscured. On appeal it was sought to lead evidence from an expert witness who would testify as to the unreliability of such eyewitness testimony, particularly in light of the strongly suggestive nature of the identification procedures adopted. The High Court ruled against the admissibility of this evidence for various reasons, but primarily because expert evidence 'is admissible only if it is necessary for the proper resolution of the dispute' and in a case of this kind it is necessary only if the tribunal of fact would be unable to reach a sound conclusion without it.⁶⁸

More importantly, however, the court suggested that expert evidence on eyewitness identification was generally inadmissible in Scotland.⁶⁹ There were various reasons for this. First, the credibility and reliability of a witness's evidence was 'for the jury to decide . . . on the basis of the jurors' own assessment of the witness'. Secondly, a safeguard exists in that the jury is always given 'a specific and thorough direction that warns them that in certain circumstances such evidence may be unreliable'. Thirdly, 'the defence can highlight the potential unreliability of eye-witness identification in cross-examination of the relevant witnesses and lead evidence of objective physical factors that might affect the reliability of the identification in question'. Finally, it was thought that if such evidence were to be admissible, the defence would lead psychological evidence, which the Crown would then seek to rebut. The result would be that trials would be considerably prolonged, while the 'focus of the trial would shift' to 'the conflicting expert views and on the cogency of the research evidence on which they were based'. Moreover, '[e]xpert evidence of that kind would of course be centred on the weaknesses of

67 [2011] HCJAC 40.

68 Ibid. at [22].

69 Ibid. at [27].

identification evidence rather than on the factors that enhance its cogency in any individual case. In our opinion, it would create a climate of disbelief.⁷⁰

It should be noted that a similar approach is taken in most other adversarial systems,⁷¹ and it is one which is far from illogical.⁷² Nonetheless, this lack of expert assistance, coupled with the tendency, noted above, of juries to set particular store by such evidence, makes it doubtful how much impact such warnings have.⁷³ In this context, the fact that juries tend to be convinced by such evidence means that the requirement of a two-thirds majority in favour of a guilty verdict is unlikely to represent much of a safeguard. Indeed the studies regarding the dangers of this type of evidence have all occurred in jurisdictions where similar safeguards are already in place.

An example of how reliance on such evidence can lead to miscarriages of justice is found in an American case where a man served 14 years' imprisonment for a crime he did not commit, ultimately being acquitted on the basis of DNA evidence:

Though ... the rape victim ... spent more than forty-five minutes with her attacker in her brightly lit home, spoke to him face-to-face, and took special care during the attack to make careful observations and notes in her mind of all the attacker's identifying characteristics, ... [she] identified the wrong man in a photographic identification, in a line-up, and at trial. She claimed to be '100% certain' of her identifications on all three occasions.⁷⁴

⁷⁰ Ibid. at [28]–[32].

⁷¹ *US v Ginn* 87 F 3d 367 (1996); *R v Audy* (No. 2) (1977) 34 CCC (2d) 231; *Smith v R* (1990) 64 ALJR 588. See also O. Holdenson, 'Admission of Expert Evidence of Opinion as to the Potential Unreliability of Evidence of Visual Identification' (1988) 16 *Melbourne University LR* 521; G. Vallas, 'A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses' (2011–2012) 39 *American Journal of Criminal Law* 97.

⁷² M. R. Leippe, 'The Case for Expert Testimony about Eyewitness Memory' (1995) 1 *Psychology, Public Policy and Law* 909; A. D. Yarmey, 'Probative v Prejudicial Value of Eyewitness Memory Research' (1997) 5 *Expert Evidence* 89.

⁷³ Cutler and Penrod, above n. 32 at 263 suggest the impact is minimal. See also R. C. Lindsay, G. L. Wells and C. M. Rumpel, 'Can People Detect Eyewitness and Identification Accuracy Within and Across Situations?' (1981) 66 *Journal of Applied Psychology* 79.

⁷⁴ D. A. Sonenshein and R. Nilon, 'Eyewitness Errors and Wrongful Convictions: Let's Give Science a Chance' (2010–11) 89 *Oregon Law Review* 263 at 264. Much earlier and equally remarkable in a different way was the case of Adolf Beck, who was convicted of fraud on two separate occasions, having been wrongly identified by 11 different witnesses in relation to the first offence and by four in relation to the second: P. Hill, 'A Century of Consistency' (1998) 148 *NLJ* 1028. A Scottish example some years later is Oscar Slater who was convicted of murder after he was wrongly identified by two witnesses as leaving the house where the murder took place, and by another 12 as having been watching the house.

It has been suggested that corroboration of eyewitness identification ought to be required in the USA.⁷⁵ It would be ironic if Scotland were to dismantle this important safeguard at a time when other jurisdictions are considering its reintroduction.

Yet how much of a safeguard is a corroboration requirement in respect of visual identification evidence? Lord Justice-General Emslie has summarised the approach of the Scottish courts in *Ralston v HM Advocate*:⁷⁶ ‘where one starts with an emphatic positive identification by one witness then very little else is required. That little else must of course be evidence which is consistent in all respects with the positive identification evidence’.⁷⁷ In other words, it is not necessary that at least two witnesses positively identify the accused as the perpetrator. Thus if one witness does so, the requirements of corroboration are met if another witness testifies that the accused has the same build as the perpetrator,⁷⁸ or is the same height and hair colour as the perpetrator.⁷⁹ Indeed it was enough in one case that the corroborating witness indicated that the accused resembled the perpetrator in terms of basic looks.⁸⁰ Lord Justice-General Rodger observed:

It is ... a common experience for people to notice that someone resembles another person even though they cannot pinpoint exactly why that should be so. This is hardly surprising since resemblance depends on many factors ... One may often notice the resemblance without consciously registering the factors which give rise to it ... Indeed it may be the overall impression of similarity, rather than any particular set of factors, which really gives rise to the resemblance between two people.⁸¹

75 S. G. Thompson, ‘Beyond a Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony’ (2007–8) 41 *University of California at Davis Law Review* 1487. For a cautious endorsement of this suggestion, see D. Crump, ‘Eyewitness Corroboration Requirements as Protections against Wrongful Convictions: The Hidden Questions’ (2009–10) 7 *Ohio State Journal of Criminal Law* 361. In certain circumstances the Supreme Court of California had insisted on corroboration of eyewitness identification—see *People v Gould* 354 P 2d 865 (1960), although it later abandoned this position (*People v Cuevos* 906 P 2d 1290 (1995)).

76 1987 SCCR 467.

77 *Ibid.* at 472, *per* Lord Justice-General Emslie.

78 *Nelson v HM Advocate* 1988 SCCR 536.

79 *Murphy v HM Advocate* 1995 SCCR 55. In an early study where participants were asked to estimate an actor’s height, there was a difference of two feet between the highest and lowest estimate, while 50 per cent of subjects overestimated the actor’s height by at least five inches: D. S. Gardner, ‘The Perception and Memory of Witnesses’ (1933) 18 *Cornell LQ* 391 at 408.

80 *Adams v HM Advocate* 1999 JC 139.

81 *Ibid.* at 140–1.

In *Kelly v HM Advocate*⁸² the corroborating witnesses picked out the accused at an identification parade as resembling the man she had seen in terms of build, hair colour and hair length. She had also picked out another individual as resembling the man she had seen, yet the court saw this as no barrier to her evidence having corroborative effect. Lord Justice-Clerk Cullen opined:

The evidence which a witness who speaks only to resemblance is able to contribute is as to the fact of that resemblance and the respect or respects in which it existed. It follows from this and from the fact that the witness was unable to make a positive identification that more than one person could be the subject of a similar observation, and that evidence as to resemblance does not of itself conflict with evidence of positive identification given by another witness. No doubt the weight which should be attached to the evidence which a witness is able to give as to resemblance is a matter which juries will have to consider. However, it is not fatal that more than one person is picked out [as] resembling the individual in question.⁸³

It may not even be necessary for the supporting eyewitness evidence to be evidence of the commission of the crime. In *Gracie v Allan*,⁸⁴ for example, the supporting evidence was of the accused acting suspiciously not far from the location of the crime not long after it had been committed. There is also the question of how positive the primary identification evidence, which is corroborated by the 'weak' identification evidence, has to be. It is clear that the witness does not have to be entirely certain that the accused is the perpetrator. It amounts to a positive identification if the witness says that the accused is 'very like' the person they saw, as in the *Gracie* case.⁸⁵ The same is true if one witness testifies to being 'eighty per cent', and another to being 'seventy-five per cent' sure that the accused is the person they saw, as in *Nolan v McLeod*.⁸⁶

Of course, as the quote from *Ralston* emphasises, even weak identification evidence must be consistent with the positive identification evidence. So in *Reilly v*

82 1998 JC 35.

83 Ibid. at 37–8.

84 1987 SCCR 364.

85 Ibid. See also *MacNeill v Wilson* 1981 SCCR 80—a witness identifying the accused as driving a vehicle was corroborated by a witness who saw him checking the vehicle.

86 1987 SCCR 558. However, in *MacDonald v HM Advocate* 1997 SCCR 116, a statement that the accused 'doesn't look unlike' the perpetrator could not be treated as a positive identification: ibid. at 119, per Lord Justice-Clerk Ross.

*HM Advocate*⁸⁷ when the evidence of the supporting witness flatly contradicted the positive identification evidence by describing the perpetrator as bearded when the main witness had described him as clean shaven, there could be no corroboration of identification. On the other hand, there can still be sufficient corroboration where the accounts of two witnesses contain contradictory elements. So in *Robertson v HM Advocate*,⁸⁸ in which two witnesses insisted that they had seen the accused commit the crime, it did not matter that they differed in their views of what he was wearing. It would appear that the accused's apparel was not the main criterion of identification here. Presumably, corroboration of identification could not occur if two witnesses were adamant that the accused was the perpetrator, but contradicted each other regarding the main identifying feature(s).⁸⁹

It can be appreciated then that the retention of the corroboration requirement as far as visual identification evidence is concerned would not *per se* offer much of a safeguard in quite a number of cases. If it were to be retained, it might be strengthened if at least two witnesses were required *positively* to identify the accused, although it might be no easy task to frame such a rule, and it is difficult to predict how the judiciary would interpret a term such as 'positive' in this context. However, the real problem with visual identification evidence is related to its very nature. While some miscarriages of justice have involved a single positive identification, others have seen an accused identified by several witnesses. No doubt in broad terms the more witnesses who can identify an accused, the more likely it is that the identification will prove to be accurate, but given that such evidence is often inherently suspect because of the factors mentioned above, the mere extent of visual identification evidence is no guarantee of accuracy. *A fortiori* then, retaining a corroboration requirement represents a fairly small step in dealing with the problematic nature of such evidence.

Of course, there can be no question of preventing a case being proved solely on the basis of visual identification evidence; despite its generally problematic nature, there will be situations where the accuracy of the identification is not in doubt, and the only issue is the veracity of the witness. More generally, as Henry J noted in *R v Pattison*:⁹⁰

87 1981 SCCR 201.

88 1990 SCCR 142.

89 Gordon, above n. 11; B. S. Jackson, 'Susanna and the Singular History of Singular Witnesses' (1977) *Acta Juridica* 37.

90 [1996] 1 Cr App R 51.

It is universally recognised that mistaken visual identifications have in the past led to wrongful convictions. But any law that said that no person could be convicted on visual identification evidence alone would lead to ... 'affronts to justice' and to serious consequences to the maintenance of law and order.⁹¹

It may therefore be that legislators should be concentrating on improving the quality of identification evidence through such devices as the guidelines provided for the authorities under Code D of the Police and Criminal Evidence Act 1984 in England,⁹² and that corroboration in this context is more of a red herring.

Lord Carloway claimed that his *Review* represented an 'opportunity ... to explore the possibility of introducing radical changes to some of the fundamental precepts and principles of the criminal justice system'.⁹³ We suggest that the Bill represents an opportunity to strengthen aspects of the law of evidence. In 2004, the Scottish Parliament recognised the legitimacy of admitting expert psychological or psychiatric testimony. Thus the relevant legislation now provides: 'Expert psychological or psychiatric evidence relating to any subsequent behaviour or statement of the complainer is admissible for the purposes of rebutting any inference adverse to the complainer's credibility or reliability as a witness which might otherwise be drawn from the behaviour or statement'.⁹⁴ The Scottish Parliament ought to consider enacting a similar provision, allowing evidence to be led from experts in the field of identification, in appropriate cases. Rather than trial judges merely warning of the dangers of accepting uncorroborated identification evidence, such testimony could explain the inherent unreliability of the human memory in certain types of situations. This may prove to be a stronger safeguard against miscarriages of justice than the existing corroboration requirement.

(b) Confession evidence

The second area where consideration might be given to the retention of a corroboration requirement relates to evidence of an extra-judicial confession. English law has never seriously entertained the prospect that confessions should require to be

⁹¹ Ibid. at 53.

⁹² For analysis of Code D, see A. Roberts, 'The Problem of Mistaken Identification: Some Observations on Process' (2004) 8 E&P 100.

⁹³ *Carloway Review*, above n. 8, Foreword, at 3.

⁹⁴ Criminal Procedure (Scotland) Act 1995, s. 275C(2), inserted by the Vulnerable Witnesses (Scotland) Act 2004. 'Complainer' is the Scottish equivalent to an English 'complainant'.

corroborated. In 1981⁹⁵ and again in 1993,⁹⁶ law reform commissions recommended against introducing any sort of corroboration requirement. The latter commission did recommend that juries ought to be warned to be careful about convicting on the basis of a confession alone,⁹⁷ but this recommendation was not followed. In contrast to this, currently in Scots law, the fact that an accused has previously confessed to the crime does not obviate the need for corroboration. As Lord Justice-Clerk Thomson expressed it: 'There is a rule in our law ... that short of a solemn plea of guilt, an admission of guilt by an accused is not conclusive against him, unless it is corroborated by something beyond the actual admission'.⁹⁸ Moreover, corroboration must be found other than in the fact of confession itself. Confessing to more than one person or repeating the confession on different occasions does not amount to corroboration.⁹⁹ Of course, if s. 57 of the Bill is enacted, corroboration will no longer be required, and a conviction could be obtained on the basis of a confession alone. This may be thought entirely appropriate, since there is surely no more significant evidence against an accused than his confession. Yet, while Scotland is (currently) unique in retaining a general corroboration requirement, it is not the only jurisdiction to have a corroboration requirement in relation to confessions. Most US states maintain such a requirement¹⁰⁰ in order to avoid 'errors in convictions based on untrue confessions alone'.¹⁰¹ According to the US Supreme Court, the foundation of the corroboration requirement:

lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused. Confessions may be unreliable because they are coerced or induced, and although

95 Royal Commission on Criminal Procedure, Cmnd 8092 (1981) para. 4.74.

96 Royal Commission on Criminal Justice, Cm 2263 (1993). The Commission took note of empirical studies—primarily *Corroboration and Confessions: The Impact of a Rule Requiring That No Conviction Can Be Sustained on the Basis of Confession Evidence Alone*, Royal Commission on Criminal Justice Research Study No. 13 (1993)—which suggested that only a small percentage of cases would be affected by a corroboration requirement, although it conceded that 'the absolute numbers would nevertheless be quite high' (at 65, para. 70).

97 Ibid. at paras 76–80.

98 *Sinclair v Clark* 1962 JC 57 at 62.

99 See, e.g., *Bainbridge v Scott* 1988 SLT 871.

100 See C. J. Ayling, 'Corroborating Confessions: An Empirical Analysis of Legal Safeguards Against False Confessions' (1984) *Wisconsin Law Review* 1121. Military law also requires confessions to be corroborated: see J. W. Moore, 'The Corroboration Quandary: A Historical Overview of the Interpretation of MRE 304(g)' (2011) 67 *Armed Forces Law Review* 89.

101 *Warszower v US* 312 US 342 at 347 (1941). For an argument that all states should require confessions to be corroborated, see B. Sangero, 'Miranda is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession' (2007) 28 *Cardozo Law Review* 2791.

separate doctrines exclude involuntary confessions from consideration by the jury ... further caution is warranted because the accused may be unable to establish the involuntary nature of his statement. Moreover, though a statement may not be 'involuntary' within the meaning of this exclusionary rule, still its reliability may be suspect if it is extracted from one who is under the pressure of a police investigation—whose words may reflect the strain and confusion attending his predicament rather than a clear reflection of his past.¹⁰²

While the federal position¹⁰³ and that of certain states¹⁰⁴ is that the requirement only applies if there is no independent evidence that the crime was actually committed, other states insist that confessions should be corroborated in all cases, since:

[t]here seems to be little difference in kind between convicting the innocent where no crime has been committed and convicting the innocent where a crime has been committed, but not by the accused ... Indeed it is oftentimes more likely that persons giving false confessions ... will confess to crimes where there is abundant proof of the *corpus delicti*.¹⁰⁵

Yet are fears of false confessions justified? It is very difficult to assess how frequently false confessions are made,¹⁰⁶ but there is ample evidence that they do

102 *Smith v United States* 348 US 147 at 153 (1954).

103 See *Wong Sun v US* 371 US 471 at 480 (1963). There are perhaps echoes of this approach in *Meredith v Lees* 1992 JC 127. Reacting to the statement by Lord Justice-Clerk Ross in *Greenshields v HM Advocate* 1989 SCCR 637 at 642 that 'if there is a clear and unequivocal admission of guilt, then very little evidence in corroboration of such an admission is required', Lord Justice-General Hope cautioned that this approach held dangers where there was no real evidence beyond the confession that a crime has been committed. He added: 'In some cases there may be ample evidence from other sources that the crime libelled has been committed. The remaining question will then be whether the accused committed the crime. A clear and unequivocal confession of guilt on his part may then require little more by way of evidence to corroborate it' (1992 JC 127 at 131). See also *Sinclair v Tudhope* 1987 SCCR 690 as an example of a case where evidence of a confession was held insufficient for conviction in the absence of other evidence that the crime was committed.

104 J. S. Millstein, 'Confession Corroboration in New York: A Replacement for the Corpus Delicti Rule' (1977–78) 46 *Fordham Law Review* 1205.

105 *State v Lucas* 30 NJ 37 at 57 (1959).

106 M. McConville and J. Baldwin, 'The Role of Interrogation in Crime Discovery and Conviction' (1982) 22 *Brit J Criminol* 165; K. A. Findley, 'Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions' (2002) 38 *California Western Law Review* 333 suggests that not far short of a quarter of all wrongful convictions in the USA may be attributable to false confessions.

occur.¹⁰⁷ Quite apart from the situation where the suggested confession was never in fact made,¹⁰⁸ individuals do make false confessions for all manner of reasons.¹⁰⁹ As the Royal Commission on Criminal Justice observed:¹¹⁰

(i) people may make false confessions entirely voluntarily as a result of a morbid desire for publicity or notoriety;¹¹¹ or to relieve feelings of guilt about a real or imagined previous transgression;¹¹² or because they cannot distinguish between reality and fantasy; (ii) a suspect may confess from a desire to protect someone else from interrogation and prosecution; (iii) people may see a prospect of immediate advantage from confessing¹¹³ (e.g. an end to questioning or release from the police station¹¹⁴) ... and (iv) people may be persuaded temporarily by the interrogators that they really have done the act in question ...¹¹⁵

It may also be the case that a suspect simply wishes to please their interrogator.¹¹⁶

There may thus be a case for Scotland retaining the requirement of corroboration in relation to confessions. But how strong a safeguard is that requirement? It may be noted as a preliminary matter that the statement above that confessing to more than one person or repeating the confession on different occasions does not amount to corroboration requires qualification. In *Campbell v HM Advocate*¹¹⁷ Lord Justice-Clerk Cullen agreed with counsel that:

107 R. Pattenden, 'Should Confessions Be Corroborated?' (1991) 107 LQR 317.

108 M. McConville and J. Baldwin, *Courts, Prosecution and Conviction* (Oxford University Press: Oxford, 1981) 166–7.

109 T. Reik, *The Compulsion to Confess* (Farrar, Straus, and Cudahy: New York, 1959).

110 Above n. 96 at 57.

111 *R v Sykes* (1913) 8 Cr App Rep 233 at 237, Ridley J.

112 S. M. Kassin and L. Wrightsman, 'Confessions Evidence' in Kassin and Wrightsman (eds.), *The Psychology of Evidence and Trial Procedure* (Sage: London, 1985).

113 As in *Boyle v HM Advocate* 1976 JC 32; where a soldier who had gone AWOL confessed to a bank robbery, because he preferred a civilian to a military prison.

114 S. M. Kassin, S. A. Drizin, T. Grisso *et al.*, 'Police-Induced Confessions: Risk Factors and Recommendations' (2010) 34 *Law and Human Behavior* 3.

115 Perhaps because of vulnerability or simply an exaggerated deference towards authority. See D. J. Bem, 'Inducing Belief in False Confessions' (1966) 3 *Journal of Personality and Social Psychology* 707; G. H. Gudjonsson and K. K. Singh, 'Interrogative Suggestibility and Delinquent Boys: An Empirical Evaluation Study' (1984) 5 *Personality and Individual Differences* 425; G. H. Gudjonsson and B. Lebeque, 'Psychological and Psychiatric Aspects of Coerced-Internalized False Confessions' (1989) 29 *Journal of the Forensic Science Society* 261.

116 E. D. Driver, 'Confessions and the Social Psychology of Coercion' (1968) 82 *Harv L Rev* 42.

117 1998 JC 130.

Evidence of an accused giving an instruction, making a promise or expressing his thanks in circumstances which were directly related to the commission of a crime should be regarded as incriminating conduct rather than an admission of past conduct ... [This] evidence provided a separate source of evidence against [the accused] in addition to the [confession].¹¹⁸

Thus evidence that Campbell had thanked an accomplice after the commission of the crime was held to amount to corroboration of his confession. More importantly, however, the doctrine of corroboration operates rather differently in relation to confessions. As Lord Dunpark put it in *Hartley v HM Advocate*:¹¹⁹

The standard of corroboration of an unequivocal confession of guilt is, in my opinion, different from the standard to be applied when seeking corroboration of a Crown eye-witness ... The reason for the different standard is that, unlike such other evidence, the confession of guilt by an accused person is prejudicial to his own interests and may, therefore, initially be assumed to be true. Accordingly, one is not then looking for extrinsic evidence which is [more] consistent with his guilt than with his innocence, but for extrinsic evidence which is consistent with his confession of guilt. If, therefore, a jury is satisfied that a confession of guilt was freely made and unequivocal in its terms, corroboration of that confession may be found in evidence from another source or other sources which point to the truth of the confession.¹²⁰

In other words, a confession can almost corroborate itself in the sense that corroboration can be found in the fact that the circumstances of the crime coincide with the confession.

This approach might be seen to make perfect sense in cases like *Manuel v HM Advocate*,¹²¹ where the confession revealed details which only the perpetrator could

118 Ibid. at 137.

119 1979 SLT 26.

120 Ibid. at 33.

121 1958 JC 41. A similar approach is to be found in A. J. Alison, *Principles and Practice of the Criminal Law of Scotland*, Vol II (1833) 580–1: ‘if a person is apprehended on a charge of theft, and he tells the person who seized him, that if he will go to such a place, and look under such a bush, we will find the stolen goods; or he is charged with murder or assault, and he says that he threw the bloody weapon into such a pool, in such a river, and it is there searched for and found; without doubt these are such strong confirmations of the truth of the confession, as renders it of itself sufficient ... to convict the prisoner’.

know. Manuel had indicated in his confession where he had left the victim's body and certain items of her clothing, then led the police to the body itself. In such a case the concern that the confession might be fabricated is largely absent.¹²² However, the approach also seems to prevail when there is no such safeguard.¹²³ Thus in *McAvoy v HM Advocate*¹²⁴ it was no bar to conviction that the coincidence of the details of the confession with those of the crime providing corroboration was largely in the public domain. Lord Hunter opined that it was 'not ... necessarily fatal ... that persons other than the accused had become aware of the facts and circumstances used as corroboration of a detailed confession before the confession itself had been made'.¹²⁵ Similarly, Lord Justice-General Emslie, delivering the opinion of the court in *Wilson v HM Advocate*,¹²⁶ observed that it was 'not for the trial judge to evaluate the weight that should be given to the circumstance that [by the time the confession was made] many people knew or had heard of many of the details of the crime. That was essentially a matter for the jury to consider'.¹²⁷ In the same way, the fact that an accused can advance an innocent explanation for the 'special knowledge' revealed in a confession does not mean that it can no longer corroborate. It is once more for the jury to decide what to make of such an explanation. Thus in *Andrew v HM Advocate*¹²⁸ in which the accused

122 But not wholly absent, since quite apart from the situation where the very fact of the confession is fabricated, the possibility exists that a suspect may have been persuaded what to say by his interrogators. This may happen without any deliberate intent on the part of such interrogators: A. Kellam, 'A Convincing False Confession' (1980) 130 NLJ 29.

123 Scots law seeks to protect against the situation that a special knowledge confession may not have been made at all by demanding corroboration of the fact that the confession actually occurred. Thus Lord Justice-Clerk Ross noted in *Low v HMA* 1994 SLT 277 at 287 that '[n]ormally an admission spoken to by one witness may be corroborated by other evidence. ... However, a circumstantial or special knowledge admission is in a different situation ... there must be evidence from two witnesses to the effect that the accused made the statement attributed to him'. He later qualified that in *Mitchell v HM Advocate* 1996 SCCR 97 to make clear that it was the fact of the making of the special knowledge confession which required corroboration, not every detail of that confession. He observed (at 99) that '[w]hat the court laid down [in *Low*] was that it was the making of the alleged confession by the accused which required to be proved by two witnesses. The court did not say that each and every element which was alleged to constitute special knowledge required to be spoken to by two witnesses'. The reasoning behind this approach is presumably that while one witness might falsely claim that a suspect made a special knowledge confession, it is unlikely that more than one witness would do so. It may be wondered how realistic such a view is. It might be added that where an accused has made two separate special knowledge confessions, there is no need to have corroboration as to their making: *Murray v HM Advocate* 2009 JC 266.

124 1983 SLT 16.

125 Ibid. at 20.

126 1987 JC 50.

127 Ibid. at 54.

128 2000 SLT 402. See also *Cairns v Howdle* 2000 SCCR 742 where the accused suggested that he had derived his special knowledge from witnessing the crime.

suggested at his judicial examination that he had overheard the details of the crime revealed in his 'confession', Lord Justice-Clerk Cullen noted that:

the jury had before them evidence of statements made by the appellant which they were entitled to regard as evidence that the appellant displayed the knowledge of the circumstances of the crime which would be possessed by a perpetrator. The fact that the jury heard that at judicial examination he gave a different explanation did not affect the position. Even if he had given evidence to the same effect, which he did not, it would have been for the jury to decide whether that evidence led them to reject what he had said to the police.¹²⁹

Nor is it any bar to a confession providing its own corroboration that only some of its points coincide with the details of the crime, while others are actually at odds with those details. Lord Justice-Clerk Wheatley remarked in *Gilmour v HM Advocate*:¹³⁰ 'Where a statement contains points of identity and points of discrepancy, then, ... it is for the jury to decide whether they are going to accept and proceed upon the points of identity, and if they do so the only question then is whether these points are sufficient in law to constitute corroboration of the admission of guilt'.¹³¹

It can be seen then that the safeguard provided by the insistence that a confession must be corroborated has been significantly weakened. Special knowledge confessions can corroborate when the knowledge revealed is not so special, in that it is shared by many or could have been acquired other than by being the perpetrator of the crime. Indeed, a special knowledge confession can still corroborate even if parts of it are entirely inaccurate. To say that such matters are capable of being weighed by the jury is especially problematic, since all available evidence indicates that juries are particularly impressed by confessions;¹³² thus the chances of being acquitted in such circumstances are

129 2000 SLT 402 at 405.

130 1982 SCCR 590.

131 Ibid. at 607.

132 See A. P. Sealy and A. McKew, 'The Effect of Confession and Retraction on Simulated Juries' in S. M. Lloyd-Bostock (ed.), *Psychology in Legal Contexts: Applications and Limitations* (Palgrave Macmillan: Oxford, 1981); S. M. Kassin and K. Neumann, 'On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis' (1997) 21 *Law and Human Behavior* 469.

133 McConville and Baldwin, above n. 108 at 159.

very low,¹³³ especially as judges in Scotland do not routinely warn juries of the dangers of relying on uncorroborated confessions, as happens in certain other jurisdictions.¹³⁴ Admittedly, in this context the court is more open to the admissibility of expert evidence in relation to the reliability of confessions. Thus experts can be heard on such matters as an accused's peculiar susceptibility to pressure when questioned by the police,¹³⁵ and the likelihood that several people who heard a statement could each recall it in almost identical terms.¹³⁶ However, special circumstances must be present before expert evidence may be admitted.

To what extent do the points made above undermine the case for seeking to retain the corroboration requirement in relation to confessions? Assuming that the case for dispensing with a general corroboration requirement is accepted, it might be argued that any suggestion that it be retained for particular forms of evidence must be justified by fairly strong arguments. We suggest that there are indeed compelling arguments in favour of demanding that confessions should continue to require to be corroborated. The fact that the Scottish courts have tended to undermine the effect of this safeguard in certain ways does not mean that the requirement is no safeguard at all. It may even be argued that if the legislature were to signal the continuing importance of corroboration in this area by retaining the requirement, the courts might reconsider their approach. That might not be entirely fanciful, as there have been cases which have gone against the general trend and sought to confine special knowledge confessions to their proper sphere. Thus in *Woodland v Hamilton*¹³⁷ Lord Sutherland (delivering the opinion of the court) stated:

We consider that the test to be applied is whether the matters about which an accused person speaks are things of which he would have no reason to be aware if he was not the perpetrator of the crime. Putting it another way, does he have special knowledge the only reasonable explanation of which is that he was the perpetrator?¹³⁸

134 A. Choo, 'Confessions and Corroboration: A Comparative Perspective' [1991] Crim LR 867.

135 *Gilmour v HM Advocate* 1982 SCCR 590.

136 *Campbell v HM Advocate* 2004 SLT 397; but compare *Coubrough v HM Advocate* [2008] HCJAC 13.

137 1990 JC SLT 565.

138 *Ibid.* at 566.

Similarly there are suggestions in *Hamilton v Normand*¹³⁹ that if details are drawn from the accused by specific questioning by the police when they are already in possession of those details, it is not safe to find corroboration in the coincidence between the details and the confession. If such authorities were to be reasserted, then the corroboration requirement would be a real safeguard.

An alternative approach might be to frame the statutory exception, so that it was made clear that a confession required to be corroborated by evidence which was independent of the confession itself. Could a statutory rule be devised, which allowed for special knowledge corroboration, but kept it in the appropriate sphere? For example, legislation could provide that: 'A confession requires to be corroborated by evidence independent of the confession, except where the confession reveals special knowledge of the crime, the only reasonable explanation of which is that the accused was the perpetrator'. It may be that the courts would find a way to interpret this so as to reinstate the current approach to special knowledge confessions, but no statutory language is ever judge-proof, and ultimately the legislature must trust the judiciary in such matters. Provision could also be made for expert testimony to be admitted, to explain to jurors that not all 'confessions' are genuine. Without such expert evidence to guide them, juries will struggle to fathom why an innocent person would confess to a crime. Simply requiring a two-thirds majority in favour of a guilty verdict is unlikely to provide any real safeguard, and certainly nowhere near as secure a safeguard as a proper corroboration requirement.

Conclusion

Proceeding on the assumption that the general requirement for corroboration in Scottish criminal cases is unlikely to survive, this article has considered whether there might yet be room to retain a corroboration requirement in relation to one or both of two types of problematic evidence. As regards visual identification evidence, the article has shown that this type of evidence is prone to produce unsafe convictions, and that the requirement of a two-thirds jury majority in favour of conviction is most unlikely to have any effect on that tendency. It has to be conceded, however, that any safeguard which the corroboration requirement might have provided in this area has been weakened by the way in which the

139 1994 SLT 184 at 187, *per* Lord Justice-Clerk Ross: 'I find it difficult to regard the confession in the present case as a special knowledge confession when the special knowledge attributed to the appellant did not emerge voluntarily and spontaneously but in response to leading questions from the police officers. In such a situation it can hardly be contended that the appellant can only have acquired his knowledge ... as perpetrator'. But compare the dissenting judgment of Lord Morison at 189.

Scottish courts have developed the law. Since the problems with this type of evidence lie in its very nature, the conclusion is that it would be more productive to seek to improve the quality of such evidence by prohibiting dock identification, and allowing expert testimony to be led to explain the problematic nature of some forms of identification. In respect of confessions, it has been shown that uncorroborated evidence of this type is similarly problematic, and that increasing the jury majority is a poor substitute for a corroboration requirement. The article expresses concern regarding the way in which the courts have weakened corroboration as a safeguard in this area, but sees this not as an argument for abandoning the requirement, but for restoring, and indeed strengthening, the original effect of that requirement, aided by appropriate statutory provisions.